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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

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BRIEF FOR APPELLEES ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

QUESTIONS PRESENTED

The principal question presented is whether the district court correctly enjoined the enforcement of certain car service rules promulgated by the Interstate Commerce Commission, which generally require that off-line freight cars be returned, either loaded or empty, in the direction of the railroad that owns them, whether or not the owning road wants or needs them and without regard to whether there is freight awaiting shipment at the point of unloading.

This question involves the following subsidiary questions:

1. Whether the Commission's effort to compel car-poor roads to purchase additional cars by enforcing a system of car distribution that will deprive such roads of adequate cars to serve their shippers is "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act in the absence of findings by the Commission that such roads will be able to purchase cars and in the face of substantial and uncontroverted evidence that enforcement of the order will worsen car service and adversely affect competition among both carriers and shippers.

2. Whether the Commission's order can be sustained under the Administrative Procedure Act in the absence of evidence and findings that the order will improve car service or increase the size of the freight car fleet, and where, although compliance with the order is admittedly impossible, no adequate provision exists for securing relief from the order.

STATUTES INVOLVED

In addition to Section 1(14)(a) of the Interstate Commerce Act, 40 Stat. 101, as amended, 49 U.S.C. § 1(14)(a) (1970), set forth at page 3 of the Government's brief, the following statutes are involved in this case: Section 1(21) of the Interstate Commerce Act, 41 Stat. 478, as amended, 49 U.S.C. § 1(21) (1970); National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 (1970); Sections 7, 8, and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 556, 557, 706 (1970). The full texts of these statutes are set forth in an appendix to this brief.

STATEMENT

This is an appeal from a unanimous opinion and judgment of a three-judge district court which enjoined

enforcement of the portion of an order of the Interstate Commerce Commission ("Commission") that prescribed two car service rules for mandatory observance by a majority of the nation's rail carriers. The decision of the Commission to make the rules obligatory was contrary to the recommended decision of the Hearing Examiner, who had evaluated the hundred odd statements admitted into evidence and had presided over the 50 day hearing; moreover, it was contrary to the position advanced by both the railroad industry and the shipping public that the order would have substantial adverse effects upon their operations.

The administrative proceedings that led to the order under review were begun in December of 1963 when the Commission undertook a study of "the adequacy of railroad freight car supply . . . ." 29 Fed. Reg. 119 (1964). The initial phase of the proceeding was ended in June of 1964 when the Commission announced "the existence of a substantial inadequacy of ownership in more than one category of freight cars throughout the United States."[1]

In July of 1964, the Commission commenced a formal rule making proceeding[2] investigating all phases of freight car ownership and use, and looking toward "the prescription of rules designed to alleviate the problem . . . ." (29 Fed. Reg. 11653, 11654 (1964).) During the course of that proceeding, a Commission witness proposed that certain car service rules, including Rules 1 and 2, be prescribed for mandatory observance. (V.S. 3, p. 118 (C. C. Robinson), App. 181.)[3]

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[1] *Investigation of Adequacy of Railroad Freight Car Ownership*, 323 I.C.C. 48, 60 (1964).

[2] The proceeding was instituted under § 1(14)(a), among others, of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970).

[3] Verified statements submitted in the course of the administrative proceeding are cited as: "V.S." and reply verified statements are cited as "R.V.S." Testimony at the hearing is cited "Tr." Briefs

Rules regulating the use of freight cars have been in effect for many years among railroads and the Association of American Railroads ("AAR") for the purpose of providing reasonable car service for shippers of all classes. The rules have been regarded as guidelines, and strict adherence to them has never been required.[4] Car Service Rules 1 and 2 deal with the disposition of freight cars unloaded on the line of a railroad that does not own the car. In general, those rules require that such a "foreign" car must be returned, loaded or empty, to or in the direction of the road that owns the car. Such return, however, has never been mandatory, and has not been required when returning the car would have the effect of leaving freight unshipped at the point of unloading. Accordingly, when administered with flexibility and common sense, the rules have struck a balance between the need of the owning roads to have the use of the cars they have purchased, and the need of the non-owning roads to move the goods of the shippers located on their lines.

It was apparent to carriers and shippers that, if adopted, the proposal to require mandatory observance of AAR Rules 1 and 2 would radically restructure the nation's rail transport resources, and would deprive both the railroad industry and the shipping public of the benefits of flexible administration of the rules. They also recognized that the proposal would abolish the national freight car

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submitted following the hearing are cited as "[party's name] Br." The Hearing Examiner's report is cited as "H. Ex." The Commission's report and order and the opinion of the court below are reproduced in the Appendix to the Government's Jurisdicitional Statement and are cited as "J.S. App." Other pertinent materials are printed in the Joint Appendix filed with this Court, which is cited as "App."

[4] Indeed, present Car Service Rule 3 provides:

"Each originating carrier must use reasonable diligence to see that foreign cars are loaded or handled in accordance with provisions of Car Service Rules." (J.S. App. 129.)

pool, with its underlying policy of maximum utilization through the movement of cars to the nearest freight needing shipment, and would substitute individual pools of cars to be used by each railroad. Accordingly, the proposal provoked an immediate and overwhelming negative response from both the railroads [5] and the shipping public; indeed, at least 20 major shippers and shipper organizations which had not previously participated in the proceeding intervened and opposed mandatory observance of the rules.[6]

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[5] Contrary to the Government's assertion (Govt. Br. 10), railroads did not advocate mandatory observance of Car Service Rules 1 and 2 as a method for increasing freight car ownership. The evidence of one of the three railroads cited by the Government in the text was stricken from the record (V.S. 16, pp. 12-13 (Northern Pac.), App. 194-95; Tr. 4015-16, App. 337); the testimony of the second concerned the railroad's *own* efforts to comply (V.S. 17, pp. 2, 11 (Penna. R.R.), App. 198); and that of the third did not focus on Rules 1 and 2. (V.S. 10, pp. 2, 3 (Gt. Northern), App. 190). In any event, the Great Northern proposal was designed to increase efficient use of existing cars, not to increase the number of those cars.

[6] The statements of shippers cited by the Government in support of the rules are misleading. For example, according to the Government, the American Plywood Association "proposed a rule to achieve return of cars 'in accordance with the present AAR car service rules . . . .'" (Govt. Br. 10.) In fact, however, Plywood's proposal (V.S. 27, p. 10, App. 206) differs significantly from the order under review since it would have returned cars to the territory from which a shipment originated, not to the owners of the cars used for the shipment. Similarly, while the Government cites the verified statement of the Secretary of Agriculture for the proposition that mandatory observance of the rules would alleviate car shortages in certain areas of the country (Govt. Br. 11, n. 13), the Secretary in fact supported the proposal on *an interim basis only* and solely for the purpose of obtaining better *data* on freight car utilization—not for the purpose of increasing supply or utilization. The Secretary specifically stated that he did "not accept the premise, that the mandatory aspect of Rules 1, 2, 3, and 4, will necessarily result in improved utility of equipment on a regional or national basis, or that absolute enforcement of these rules could possibly result in the optimum utilization of equipment." (R.V.S. 81, p. 8, App. 309.)

The nature of the shippers' opposition was varied. Some testified that mandatory observance would contribute to shipment delays, since carriers would not be permitted to supply cars of inappropriate ownership even when cars of appropriate ownership were not available; others pointed out that even when cars of appropriate ownership were available, increased switching and the necessity of reloading to accommodate changes in destination because of changes in customer needs would increase the cost of rail transportation while impairing its efficiency.[7] The National Industrial Traffic League testified that "what are now voluntary rules for the guidance of railroad management, become in effect statutes with which the shipper is encumbered" (R.V.S. 76, p. 2, App. 300),[8] and the National Association of Shippers Advisory Boards stated that mandatory observance of the rules

> "would work unnecessary hardships on shippers, limit routing and actually delay shipment. They would create red tape but not improve utilization." R.V.S. 74, p. 9, App. 298.

The steel company appellees in particular presented extensive and uncontroverted evidence that requiring mandatory observance of Car Service Rules 1 and 2 would have disastrous effects. Throughout the years, steel mills have been located and expanded in reliance upon the railroads' practice of providing access for shippers to a national car pool, without concern for the individual capa-

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[7] *See, e.g.*, R.V.S. 63, pp. 2-3 (Coal Traffic Bureau), App. 277-78; R.V.S. 67, pp. 2, 4-6 (Gypsum Ass'n), App. 282, 283-84; R.V.S. 72, pp. 2-3 (Manufacturing Chemists' Ass'n), App. 295-96; R.V.S. 74, pp. 6-7 (National Ass'n of Shippers Advisory Boards), App. 297-98; R.V.S. 76, pp. 3-7 (National Industrial Traffic (NIT) League), App. 300-03.

[8] *See also, e.g.*, R.V.S. 63, p. 2 (Coal Traffic Bureau), App. 277; R.V.S. 67, p. 2 (Gypsum Ass'n), App. 282.

bility of the specific line serving a given plant.[9] If railroad practices were changed and railroads were required to adhere strictly to Car Service Rules 1 and 2, those steel companies that suffer the bad fortune of having been located on car-poor lines would be severely restricted in their ability to compete.[10] Some steel companies presented uncontroverted evidence that they lacked sufficient yard and switching space to provide a car of proper ownership for any particular load,[11] and that shipping delays would cause production slowdowns, bottlenecks in the production process, or disable mills from filling some orders.[12] All of the appellee steel companies presented uncontroverted evidence that perfect compliance with the rules was simply impossible.[13] Taken as a whole, this evidence established that, as a practical matter, the effect of the Commission's order would be to limit severely the ability of many plants to produce and ship steel.

Following the receipt of that and other evidence in the form of verified statements and replies, the proceeding was referred to a hearing examiner for the taking of testimony and cross examination. The hearing lasted approximately 50 days and produced nearly 6,000 pages of testimony. After the conclusion of the hearing, in January, 1968, the Examiner issued a 63 page recommended report and order setting forth the record evidence, his findings of fact, and his recommended decision.

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[9] *See, e.g.*, R.V.S. 14, p. 9 (E., J. & E. Ry.), App. 226-27; R.V.S. 41, p. 2 (AISI), App. 249; R.V.S. 86, pp. 6-7, 16, 18 (Youngstown Sheet & Tube Co.), App. 330, 332-33.

[10] *See, e.g.*, R.V.S. 82, p. 16 (U.S. Steel Corp.), App. 311. *See also* R.V.S. 76, p. 4 (NIT League), App. 301.

[11] *See, e.g.*, R.V.S. 41, p. 8 (AISI), App. 252; R.V.S. 58, pp. 8, 18 (Bethlehem Steel Corp.), App. 268, 274.

[12] *See, e.g.*, R.V.S. 69, p. 8 (Inland Steel Co.), App. 289; R.V.S. 85, p. 3 (Wheeling Steel Corp.), App. 326; R.V.S. 86, pp. 7, 22-23 (Youngstown Sheet & Tube Co.), App. 330, 334-35.

[13] *See, e.g.*, R.V.S. 41, pp. 8-9 (AISI), App. 252-53; R.V.S. 58, pp. 16-17 (Bethlehem Steel Corp.), App. 273; R.V.S. 70, pp. 5-6 (J. & L. Steel Corp.), App. 292-93.

Not surprisingly, the Hearing Examiner was unequivocal in his finding that mandatory observance of Car Service Rules 1 and 2 would adversely affect the shipping public:

> "the weight of the evidence; and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers . . . ." H. Ex. 27, App. 33.

And on the basis of the evidence described above, he made unequivocal findings concering the effect of the rules on the steel industry. Thus, with respect to forecasting he found:

> "If required by mandatory car service rules to predict routing and destination of individual shipments to be loaded on a specific day the steel companies would be faced with a requirement impossible to meet. In fact it would not be possible to improve the accuracy of forecasting without drastic changes in processing, storage, and marketing practices." H. Ex. 26, App. 32.

Similarly, with respect to switching capabilities, the Examiner concluded:

> "If the plant is among those where a large proportion of the cars used for shipments have arrived under load, the necessary increase in switching would exceed the physical capabilities of the plant and the serving carriers beyond the point of rectification." H. Ex. 27, App. 32-33.

Finally, after a scrupulous review of the evidence, the Examiner concluded his recommended report and order as follows:

> "Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula,

regulations, and car service rules has not been shown to be justified." H. Ex. 63, App. 71.

Only the Commission's Bureau of Enforcement, which had first proposed mandatory observance of the car service rules, filed exceptions to the Hearing Examiner's finding that such observance was not justified. Nonetheless, on August 19, 1969, Division 3 of the Commission rejected the Examiner's carefully supported conclusion, and issued a report prescribing these car service rules for mandatory observance.[14] Beginning with the premise that there existed a chronic shortage of general purpose freight cars, the Commission concluded that the remedy for that shortage lay in prescribing car service rules, including Rules 1 and 2, for mandatory observance. (J.S. App. 88, 156-57.) In doing so the Commission recognized that imposition of the rules would not improve the utilization of freight cars "except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner" (J.S. App. 65), and that its order would exacerbate shortages on car-poor roads. It held, nevertheless, that the needs of shippers so deprived of access to rail transportation "should not be met with equipment of carriers which obtained the cars to serve other shippers." (J.S. App. 66.)[15]

On review, the district court accepted *arguendo* the Commission's conclusion that a shortage of general purpose freight cars existed. However, it recognized that the Commission had utterly failed to make findings upon which mandatory observance of Car Service Rules 1 and 2 was, or could be, based. The court first observed that

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[14] J.S. App. 28-89.

[15] In addition to prescribing mandatory observance of these car service rules, the Commission's order required the respondent railroads to prepare annual reports showing the results of an application of certain data to a car ownership formula approved by the Commission and further showing the steps, if any, taken to cure any indicated inadequacies. J.S. App. 88, 149-56.

although the Commission sought to alleviate the car shortage problem by returning the cars on foreign lines to their owners, the Commission had not found that the shortage was more acute on the owners' lines. (J.S. App. 19.) It then expressed particular concern with the Commission's failure to consider the financial effects of its order upon the non-owner lines and their shippers, despite the fact that a requirement for a car-poor carrier to increase its fleet would "of necessity, produce substantial effects on the railroad industry and the shipping public." (J.S. App. 20.) Further, the court was alarmed by the Commission's prescription of mandatory rules with which compliance was admittedly impossible but whose violation carried criminal penalties. (J.S. App. 25.) The court, therefore, held that the rules, when prescribed for mandatory observance, were not "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act.[16]

SUMMARY OF ARGUMENT

1. The district court was clearly correct in concluding that Car Service Rules 1 and 2, when prescribed for mandatory observance, are not "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act. In the first place, the history and structure of the Act require rejection of the argument, advanced by the Government, that Congress intended to permit the Commission to impose car service rules as a technique for increasing the number of cars owned by the nation's railroads. The legislative history of the Esch Act shows that Congress rejected making the car service rules mandatory by requiring their inclusion in the carriers' tariffs. Moreover, the use of the rules to enlarge the exist-

[16] Subsequently, a three-judge district court for the Middle District of Florida upheld the Commission's Order. *Florida East Coast Ry.* v. *United States*, 327 F. Supp. 1076 (1971). The Florida court considered not only the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance but also its adoption of a car ownership formula.

ing car fleet by coercing railroads to purchase cars is, without a solid showing of the ability of the affected roads to purchase cars, not only unreasonable, it is an evasion of the statute that the Court should not permit. Section 1(21) expressly prohibits the Commission from requiring a carrier to acquire additional facilities unless it finds that the railroad is financially capable of doing so without impairing its ability to serve the public. Whether or not the section applies to freight cars, it embodies a clear and reasonable congressional policy that railroads should not be required to make acquisitions which are financially impracticable or which will significantly weaken their financial structure. Clearly, the Commission should not be permitted to avoid the sound congressional policy embodied in Section 1(21) by requiring car-poor roads to purchase cars without finding, on the basis of substantial evidence, that they will be able to do so.

In the second place, the harm mandatory observance of the rules will cause the shippers and the railroads alike illustrates the unreasonableness of the order. Mandatory observance of the rules will immediately aggravate the problems caused by any existing car shortage, with no assurance that any increase in the freight car fleet will be achieved. In addition, the order will inevitably alter competitive strengths of both shippers and carriers. It will, moreover, significantly curtail the access of some shippers to rail transportation. These facts alone illustrate the soundness of the district court's conclusion that prescription of the rules for mandatory observance is not "reasonable."

2. Not only does the Commission's order fail to meet the substantive test of "reasonableness," it fails to measure up to the standards imposed upon the agency by the Administrative Procedure Act. When, as in the present case, the Commission's action will accomplish a major reallocation of the nation's rail transportation capacity with obvious and far-reaching effects upon shippers and

carriers alike, good sense alone requires that the agency action reflect a reasoned consideration of those consequences and that it rest upon solid findings grounded in substantial evidence. In this, the Commission failed utterly. It did not find that mandatory observance of Car Service Rules 1 and 2 would increase efficient use of the existing car fleet, nor did it find that such observance would achieve the stated objective of increasing the national car fleet. It gave no consideration to the obvious question whether shippers located on owning roads were in greater need than others. And there was no consideration or record evidence of the financial ability of car-poor roads, once deprived of access to the national car fleet, to remedy their inadequate ownership by purchasing additional cars. Finally, the Commission did not make any findings that the provision for exceptions from the rules would be effective. Thus, the Commission's order fails to meet the minimal requirements of the Administrative Procedure Act that it be based on reasoned findings supported by substantial evidence.

ARGUMENT

I.

THE COMMISSION'S ORDER IS NOT "REASONABLE" WITHIN THE MEANING OF SECTION 1(14)(a) OF THE INTERSTATE COMMERCE ACT.

The particular statutory standard against which rules with respect to car service [17] must be measured appears in Section 1(14)(a) of the Interstate Commerce Act ("Act"), which provides in relevant part that:

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[17] "Car service" is defined by Section 1(10) of the Act to include: "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property . . . ." 49 U.S.C. § 1(10) (1970).

> "The Commission may, after hearing . . . establish *reasonable* rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter. . . ." 49 U.S.C. § 1(14)(a) (1970) (emphasis supplied).[18]

The statute thus imposes a requirement of reasonableness that is substantively distinct from and additional to the notion generally dealt with by courts in reviewing administrative orders. An order prescribing car service rules which meets the "procedural" standards set forth in the Administrative Procedure Act may nevertheless fail to meet the test of reasonableness imposed by Section 1(14)(a).

It is our view that the court below was clearly correct in concluding that the Commission's order is not "reasonable" within the meaning of Section 1(14)(a). First, an order prescribing mandatory observance of certain car service rules for the purpose of increasing the size of the nation's freight car fleet is not reasonable where, as here, there is no finding that the car-poor carriers would be able to purchase additional cars without impairing their ability to serve the public. Second, the harm that the Commission's order will inevitably cause to the nation's rail carriers and shipping public is such as to preclude any determination by a reviewing court that the Commission's order is reasonable.

A. The Relevant Provisions of the Act Do Not Support the Reasonableness of the Commission's Order.

Two sections of the Act are relevant to this Court's review of the Commission's order. The first, relied upon by the Commission, is Section 1(14)(a), which authorizes the Commission to establish reasonable rules with

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[18] Section 1(14)(a) was amended on May 26, 1966, during the course of the proceedings below. However, the amendment did not affect the first sentence of the section, quoted in text. Pub. L. 89-430, § 1, 80 Stat. 168.

respect to car service. The second, ignored by the Commission, is Section 1(21), which authorizes the Commission under certain circumstances to require railroads to purchase additional facilities. Both illustrate the unreasonableness of the order under review.

1. The Legislative History of Section 1(14)(a) Does Not Support the Order.

The Government argues that the legislative history of the Esch Car Service Act of 1917, which added Section 1(14) to the Act, establishes the reasonableness of the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance. (Govt. Br. 19-24.) In essence, the Government argues that in 1917, as in 1970, the nation was plagued by a severe car shortage and at that time Congress sought to remedy the situation by authorizing the Commission to enforce the railroad industry's voluntary code of car service rules. However, the legislative history does not support the Government's position.

During the First World War, concern arose as to the ability of the nation's carriers to meet the war-time demands of the shipping public. The Commission responded by making certain of the railroad industry's car service rules mandatory for less than three months as to specified types of cars which were in particularly short supply.[19] Because there was some "question of the Commission's jurisdiction" to enter such an order,[20] the Commission sought clarifying legislation.[21] Such legislation was introduced by Representative Esch, and authorized Commission regulation of car service in *emergency* situa-

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[19] *Car Supply Investigation*, 42 I.C.C. 657, 674-76 (1917).

[20] 42 I.C.C. at 670-71.

[21] *See* Interstate Commerce Commission, 30th Annual Report, pp. 91-92 (1916).

tions without a hearing.[22] After the bill was passed by the House and sent to the Senate, consideration was given to the question of Commission authority to regulate car service in *non-emergency* periods.[23] The original Esch bill became Section 1(15) of the Act—not at issue here—while the language added by the Senate, conferring authority to regulate car service in non-emergency periods, became Section 1(14). Thus, the Government's references to the legislative history of the Esch bill are largely irrelevant.

In any event, it is clear that both the particular problem to which the Esch Act was directed and the substance of the legislative solution adopted are wholly different from the Commission's purpose and regulatory action in the present case. As noted above, the Esch Act was proposed in response to a growing concern that the shipping public was not being adequately served by the nation's carriers. But the issue was not the *number* of freight cars. Indeed, then-Chairman Hall of the Commission expressly stated in hearings before the House that "it has not been demonstrated that the trouble in this country is lack of rolling equipment."[24] Rather, the Congress and the Commission were focusing on the *distribution* of the existing freight car fleet. In reporting the bill to the Senate, Senator Pomerene said:

> "I desire to state in presenting the report that the purpose of the committee is to confer fuller author-

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[22] The Commission itself had focused solely on its emergency powers. *See, e.g.*, Govt. Br. 21, citing from 42 I.C.C. at 674. The Esch bill, H.R. 20352, 64th Cong., 2d Sess., reintroduced as H.R. 328, 65th Cong., 1st Sess., is discussed in Hearings on H.R. 19564, H.R. 20256 and H.R. 20352 Before the House Committee on Interstate and Foreign Commerce, 64th Cong., 2d Sess. (1917) ("House Hearings"). *See also* House Hearings, 32.

[23] *See* Hearings on S. 636 Before the Subcommittee of the Senate Committee on Interstate Commerce, 65th Cong., 1st Sess. (1917) ("Senate Hearings"), 30, 32.

[24] House Hearings, 71. *See also* Commissioner Hall's comments at House Hearings, 15.

> ity upon the Interstate Commerce Commission in connection with the distribution of cars."[25]

No mention was made, either in the Senate or in the House, of an intention to increase the ownership of freight cars. The instant case stands in stark contrast, for the Commission's report and the Government's brief both acknowledge that the "purpose of the Commission's order is to increase the *supply* of freight cars," not to improve the efficient distribution of the existing fleet. (Govt. Br. 17, emphasis in original.)

Furthermore, the Government grossly mischaracterizes the legislative solution to the problem—whether it be supply or distribution—when it says that the Act "authorize[d] the Commission to prescribe mandatory car-service rules such as those already voluntarily adopted by the rail industry." (Govt. Br. 22.) Congress expressly considered the desirability of mandatory observance of the car service rules and it rejected such a provision. The original bill in the House contained language requiring carriers to file the car service rules as part of their tariffs.[26] However, following testimony during the Senate hearings to the effect that such treatment of the car service rules would have severe adverse effects,[27] this language was stricken. Thus, although the references

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[25] 55 Cong. Rec. 2631 (1917). The Senate Report stated that "[t]he purpose of the . . . amendment . . . [was] to give the Commission plenary power over the "movement, distribution, exchange, interchange and return of cars. . . ." S. Rep. No. 43, 65th Cong., 1st Sess. 2 (1917). The term "movement, distribution, exchange, interchange and return of cars" was taken from the definition of "car service" which was added to Section 1 of the Act by the Esch Act. Act of May 29, 1917, ch. 23, 40 Stat. 101.

[26] *See* H. Rep. No. 18, 65th Cong., 1st Sess., 13 (1917).

[27] *See, e.g.*, Senate Hearings, 12.

cited by the Government indicate that Congress may have believed it desirable to achieve better observance of the industry's car service rules, Congress clearly refused to adopt an extreme measure like that advanced by the Commission here.[28]

2. The Commission's Effort To Require Carriers To Purchase Cars, Without any Finding of Their Financial Ability To Do So, Is Inconsistent With the Policy of Section 1(21) of the Act.

This Court has held that each section of the Act should "be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress." *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 366 (1915). Accordingly, in determining the reasonableness of the Commission's order under Section 1 (14) (a), the Court should consider Section 1(21) of the Act.

Section 1(21) confers upon the Commission authority to compel railroads to acquire additional equipment. However, no such acquisitions can be required unless the Commission finds that "the expense involved therein will not impair the ability of the carrier to perform its duty to the public." Whether or not Section 1(21) applies to

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[28] No matter how broadly the Government reads the legislative history of Section 1(14) (a), there is no basis for its claim that the district court has "largely negated" the "statutory discretion and power . . . vested in the Commission by Congress" by requiring the Commission to make findings sufficient to support its conclusion. (Govt. Br. 23.) According to that theory, if power exists, it may be exercised without regard to other legal principles, including those that require an agency to make findings based on substantial evidence and to prepare a written report upon which judicial review is based. Such a position is not only inconsistent with the principles of administrative law, it wreaks havoc with the requirement for "hearing" in Section 1(14) (a).

acquisition of freight cars,[29] it evidences a clear and reasonable congressional determination that railroads should not be required to make expenditures that are financially impracticable or will significantly weaken their financial structure.

This policy is plainly relevant here. The Commission's order is designed to increase freight car ownership by compelling car-poor carriers to acquire additional cars. However, as we show below,[30] the Commission made no findings—nor is there any evidence of record from which findings could be made—that the affected carriers would in fact be able to purchase additional cars. Thus, it is clear that the Commission has attempted to achieve by indirect means that which Section 1(21) specifically prohibits it from doing directly. The Court should not permit the Commission to accomplish this obvious circumvention of the policy of the Act.

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[29] The language of Section 1(21) employs the general term "facilities" rather than specifically referring to freight cars. However, in the legislative history of Section 1(21), the House Committee on Interstate and Foreign Commerce commented:

> "In a recent decision of the Supreme Court of the United States [*United States* v. *Pennsylvania R.R.*, 242 U.S. 208 (1916)] it was held that under the Commerce Act the Commission does not have the [statutory] authority to order a common carrier to supply itself with certain cars. The pending bill [the Transportation Act of 1920] gives the Commission such authority." H. Rep. No. 456, 66th Cong., 1st Sess. 17.

See also General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940), in which this Court stated "[f]reight cars are facilities of transportation, as defined by the Act."

[30] *See, infra*, at 33-34.

B. The Injury that the Commission's Order Will Cause the Nation's Rail Carriers and Shipping Public Shows that the Order Is Unreasonable.

In its effort to increase the size of the freight car fleet, the Commission has wrought a major change in the present distribution of freight cars. Whether or not the means selected will ultimately succeed, it is clear that the order will have immediate adverse effects on railroads and shippers in at least two ways. First, any present freight car shortages will be immediately and substantially aggravated rather than alleviated. Second, contrary to the National Transportation Policy, the financial condition of car-poor carriers will be impaired and competition among shippers and carriers will be adversely affected. Each of these factors should be considered, we submit, in determining the substantive reasonableness of the Commission's order; taken together they conclusively demonstrate that that order is unreasonable.[31]

1. The Commission's Order Will Aggravate Rather Than Alleviate the Present Car Shortage Problem.

The Commission's ultimate conclusion was that "there is a continuing freight car shortage which requires affirmative, remedial action at this time." (J.S. App. 87.) It is apparent that such remedial action might take either of two forms. One would be to increase the number of cars in the freight car fleet. But the Commission has

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[31] The Government argues that "the fact that the operation of the car service rules adopted by the Commission 'would resemble the practice' of the railroad industry is itself strong evidence of the reasonableness of the rules." (Govt. Br. 27.) Although such "evidence" is the strongest that the Government can assemble here, its position is incredible since mandatory observance is wholly at odds with the industry's voluntary guidelines approach. Moreover, imposing the rules to achieve an increase in the size of the freight car fleet in no way resembles the practice of the industry, which uses the rules to obtain maximum use of the existing fleet.

not found that even a single freight car will be added to the fleet as a result of its order. *See infra*, at 33-34.

The second remedy would be to increase the efficiency of use of the existing fleet. We need not even speculate whether the Commission's order will have that effect, for the Commission has stated that it will not. Referring to Car Service Rules 1 and 2, the Commission volunteered:

> "They are not designed to improve the utilization of freight cars, except insofar as the return loading is compatible with the primary objective of increasing availability of cars to the owner." J.S. App. 65.

There is no reason to wonder whether "increasing availability of cars to the owner" will promote efficient car utilization. Returning cars to their owners (whether they want them or not), rather than sending them in the direction of freight awaiting shipment, *decreases* rather than *increases* the efficiency of the car fleet as a whole. The Government has conceded as much,[32] and the Commission, in an earlier consideration of the problems caused by car shortages, has so found:

> "In periods like the present, when the car supply falls short of demands, maximum tonnage is handled by permitting cars to be reloaded immediately after a load is removed, without regard to ownership of cars or destination of shipments." *Car Service, Freight Cars*, 268 I.C.C. 687, 690 (1947).

In that proceeding, the Commission's conclusion was based in part upon its finding that mandatory observ-

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[32] In its Memorandum in Opposition to the Motions to Affirm, p. 1, the Government stated:

> "If the responsibility of the Interstate Commerce Commission for assuring to the shippers of this Nation the availability of railroad freight cars were limited to regulating the distribution of existing freight cars to provide for maximum utilization, we might agree with the view that the Car Service Rules at issue should not have been promulgated for mandatory observance . . . ."

ance of car service rules, particularly in times of shortage, would cause an increase in the empty mileage and empty car days experienced by the carriers, with the result that the aggregate carrying capacity of the fleet would be materially reduced.[33] In this case, the Commission boldly asserts the contrary: "empty car miles will be reduced in the long run if cars are used in accordance with the rules." (J.S. App. 67.) Aside from the absence of record evidence to support this assertion, there is no rationale advanced to explain the Commission's departure from its earlier substantiated finding. As this Court stated in *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653-54 (1954):

> "We do not know whether the Commission has disregarded its own findings . . . or whether . . . the Commission has modified the normal doctrine . . . or whether the Commission, for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases . . . ."

Whatever the reason for the Commission's statement with respect to empty car miles in this case, its finding and the Government's concession that mandatory observance of car service rules will not increase utilization of the existing car fleet are sufficient to enable this Court to conclude that the Commission's order will not alleviate, and in fact will immediately aggravate, the

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[33] The Commission stated:

> "On March 1, 1947, boxcars were scattered to such an extent that class I railroads had on their rails but 16.4 percent of the units owned. If the Association or the Commission should now enter an order requiring rigid observance of the car-service rules, carriers would be obliged to immediately start cars rolling in the direction of the owning roads, loaded or empty, and, because of cross hauling over direct and indirect routes of empty cars, when loads in the direction of the home road were not available, the aggregate volume of traffic handled might be materially reduced." *Car Service, Freight Cars, supra*, 268 I.C.C. at 691.

problems which the Commission addressed. Under these circumstances, we submit, the Commission's order cannot be construed as "reasonable."

Moreover, because the Commission's order will have the immediate effect of increasing the severity of any car shortage to the detriment of shippers, it contravenes the essential purpose of the Act—protection of the shipping public. That this is the statutory standard against which Commission action must be measured has repeatedly been recognized both by the courts[34] and the Commission.[35] Accordingly, Commission action must be calculated to achieve an improvement in car service in order to be sustained as "reasonable." Where, as here, the effect of Commission action is to impair car service, it is not reasonable within the meaning of Section 1(14)(a) and should be set aside.[36]

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[34] *See, e.g., Schaeffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957), where this Court set aside an I.C.C. order because the Commission failed to evaluate the benefits of the proposed transportation service to the shipping public.

[35] In its earlier report in this proceeding, the Commission stated that it was seeking to determine the extent to which carriers were able to meet "shipper requirements for cars." 323 I.C.C. 48 (1964). *See also, e.g., Car Service, Freight Cars, supra*, 268 I.C.C. at 703, where the Commission noted that any failure of the railroads to furnish adequate car service worked "to the detriment of the shipping public."

[36] *See, e.g., Atlantic Coast Line R.R.* v. *United States*, 112 F. Supp. 594, 597 (Ct. Cl. 1953), where the Court of Claims held that, under Section 1(15) of the Act governing the issuance of emergency orders respecting car service, "the Commission could not take action, the only effect of which would be to make car service worse."

2. The Adverse Effect of the Commission's Order Upon Competition Among Shippers and Carriers Is Inconsistent With the National Transportation Policy.

The National Transportation Policy [37] enjoins the Commission to administer the Act so as

> "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ."

Consistent with that Policy, the Commission must be sensitive to the "policies embodied in other legislation enacted at different times and with different problems in view." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944). In *Denver & R.G.W. R.R.* v. *United States*, 387 U.S. 485, 492-94 (1967), this Court expressly recognized the Commission's obligation, placed upon it by the National Transportation Policy, to consider the anti-competitive effect of a proposed merger or acquisition. The Commission, too, has recognized that it

> "may not ignore [the policy favoring competition] as a relevant factor in fostering the objectives of the national transportation policy . . . ." *Contract Rates, Rugs & Carpeting from Amsterdam, N. Y.*, 313 I.C.C. 247, 253 (1961), *aff'd sub nom., New York Central R.R.* v. *United States*, 194 F. Supp. 947 (S.D.N.Y. 1961), *aff'd per curiam*, 368 U.S. 349 (1962).[38]

Indeed, we submit that the Commission is under an affirmative obligation to appraise the effects of the curtailment of competition and of the public benefits, if any, to be derived from such curtailment, in determining whether prescription of the rules for mandatory observ-

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[37] 49 U.S.C., preceding § 1, 54 Stat. 899 (1940).

[38] *See also Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, *aff'd sub nom., Erie-Lackawanna R.R.* v. *United States*, 259 F. Supp. 964 (S.D.N.Y. 1966), *rev'd on other grounds sub nom., Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372 (1967).

ance is consistent with the public interest and the National Transportation Policy. In *McLean Trucking Co., supra*, this Court stated that resolving such conflicting considerations

> "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used . . . .'" 321 U.S. at 87.

In the present case it cannot fairly be said that the Commission discharged its obligation.

a. *Competition among shippers.*

The competitive position of many businesses depends upon their access to transportation service not inferior to that available to their competitors. Indeed, the steel industry presented evidence in this proceeding to demonstrate that their customers frequently order from the mill that can provide the fastest delivery.[39] However, if mandatory observance of Car Service Rules 1 and 2 is required, the ability of shippers to compete will depend in some measure upon the accident of location—*i.e.*, upon the adequacy of the car ownership of the individual railroad providing the originating service. Thus, business firms that located their plants and designed their production and shipping facilities in reliance upon the railroad industry's practice of free access to and use of cars in the national freight car fleet[40] will be arbitrarily deprived of reasonable access to rail transportation services if the lines on which they are located are among the car-poor carriers. Under these circumstances, the effect of the order will be to lessen the importance among shippers of traditional

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[39] *See, e.g.*, R.V.S. 85, p. 5 (Wheeling Steel Corp.), App. 327; R.V.S. 86, p. 7 (Youngstown Sheet & Tube Co.), App. 330.

[40] *See supra*, at 6-7.

competitive factors—*i.e.*, price, quality, special features, maintenance and support capabilities—and reward instead the fortuity of location upon a line with an adequate car supply.

b. *Competition among carriers.*

The nation's rail system is made up of large and small originating carriers of diverse economic strengths. These carriers compete with each other to serve shippers on their lines. Smaller carriers are able to compete effectively only because they have access to a general pool of cars. By eliminating the smaller carriers' access to this car pool, the Commission's order will severely impair the ability of those carriers to compete.

In the first place, the immediate effect of the Commission's order will be to divert shipping revenues from these carriers to the high-ownership lines. On its face, therefore, the Commission's order seems irreconcilable with the mandate of the National Transportation Policy that the Commission "foster sound economic conditions in transportation and among the several carriers." The conflict is particularly glaring in view of this Court's recognition that one of the factors in fostering "sound economic conditions" is "protecting existing carriers' revenues." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

In the second place, the Commission acted in part on the unfounded assumption that the shorter or weaker lines would offset the loss of access occasioned by strict enforcement of the rules by purchasing additional equipment. As is discussed *infra*, at 33-34, the assumption that the weaker lines will be able to purchase additional equipment, even assuming no immediate loss of revenues, is without support in the record,[41] and cannot be sup-

[41] On argument to the court below, the General Counsel of the Commission admitted that there was no "testimony on the record

ported in fact.[42] Many carriers are simply not able to cure inadequacies in freight car ownership by purchasing additional cars; they will thus be unable to avoid the Commission-imposed limitation on their ability to compete.

Not only will the Commission's order limit the ability of the weaker carriers to compete with the stronger carriers, but, over a period of time, it will enable the stronger carriers to increase imbalances in strength. There are many situations where a stronger and a weaker carrier each serve a single location but neither owns an adequate number of cars to satisfy the needs of the shippers at that location.[43] If strict enforcement of Car Service Rules 1 and 2 will, as the Commission presumes, encourage carriers to purchase the needed equipment, it is likely that, while the stronger carrier may be able to expand its fleet, the weaker will not. And as the stronger carrier expands its freight car ownership, it will also expand its share of the originating traffic until it dominates the market—a result totally inconsistent with the basic antitrust policy against undue market concentration. *See United States* v. *Philadelphia Nat'l Bank*, 374

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indicating the capacity of railroads to increase their fleets and to provide better maintenance for their cars." Tr. Oral Arg. 13, App. 5.

[42] Indeed, Chairman Stafford of the Commission testified at congressional hearings cited by the Government (Govt. Br. 8) that in order to remedy the deficiency in the nation's freight car fleet "[b]illions of dollars are needed; [but] the present economic condition of the railroads precludes their meeting the challenge." Hearings Before the Special Committee on Freight Car Shortages of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess., 239 (1971).

[43] *See, e.g.*, R.V.S. 86, pp. 18, 21 (Youngstown Sheet & Tube Co.), App. 333-34, which discusses the situation at Youngstown's Campbell plant, which is served by at least one relatively strong road—the B. & O.—and two weak lines—the Penn Central and the Erie Lackawanna.

U.S. 321 (1963). *See also Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

A second anti-competitive effect of the rules arises in situations where a long-haul carrier competes for traffic with a short-haul carrier. The situation at the Fairless, Pennsylvania plant of U.S. Steel is typical. That plant is served by Reading and Penn Central. The Reading ownership of gondola cars amounted to 3,848 and that of the Pennsylvania Railroad and New York Central Railroad to 46,437 on December 31, 1964. (V.S. 2, Exhibit 8, p. 7, App. 156.) Only small proportions of the shipments originated by shorter lines move to destinations on those lines. Obviously the smaller car supply of Reading will be depleted and moved to the lines of other railroads more rapidly than the larger supply of Penn Central, which serves many more destinations. Reading would thus be increasingly less able to compete with Penn Central to supply the plant at Fairless with cars suitable for routing to all destinations.[44]

A final anticompetitive effect derives from denial to shippers of their right to select routes. Shippers have long possessed the right fully to control the routing of their shipments. This right is guaranteed by the Act, 49 U.S.C. § 15(8) (1970), and has been consistently upheld by the Commission and the courts. *See, e.g., Johnson Machine Works, Inc.* v. *Chicago, B. & Q. R.R.*, 297 F.2d 793 (8th Cir. 1962); *Electric Boat Division* v. *New York, N.H. & H. R.R.*, 316 I.C.C. 313 (1962). The fact that a shipper may have a choice of carriers provides a strong incentive for vigorous competition among carriers and enables shippers to demand and re-

[44] The magnitude of the problem encountered by the shorter lines is exemplified by the similar situation at the Bethlehem mill at Bethlehem, Pennsylvania, where only 33% of the shipments that originate there terminate on the roads of the lines that serve the mill. (R.V.S. 58, p. 5 (Bethlehem Steel Corp.), App. 267.)

ceive the best possible service for their freight.[45] However, if the car service rules must be rigorously adhered to, there will be no incentive for carriers to compete by attempting to offer better services, for routes will be determined not by a shipper's preferences but by the fortuitous circumstance of the ownership of cars immediately available for loading.

Thus, the Commission's order will alter existing competition among carriers and shippers, and will create new competitive relationships by Commission fiat. Such a result is contrary to the Act, which was intended to prohibit all forms of discrimination within the reach of Congress. *See The Shreveport Case*, 234 U.S. 342, 356 (1914); *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 512-13 (1931). *See also, Southern Pacific Co.* v. *United States*, 277 F. Supp. 671 (D. Neb. 1967), *aff'd per curiam*, 390 U.S. 744 (1968). Absent strong and clearly articulated justification, such action is impermissible. *Cf. American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

In the present case, it is clear that the Commission's report contains no such justification. In fact, the Commission's report is devoid of any finding that specifically treats the competitive effects of its order. And the only indirect reference is a passing comment:

> "Although mandatory observance of these rules [1 and 2] may create shortages on roads which own insufficient equipment, . . . the needs of shippers affected should not be met with equipment of carriers

[45] Freedom to specify routes is important to shippers with changing market demands or stop-off points for fabrication, unloading or additional loadings. The Commission recognized these factors in *Pennsylvania R.R.—Merger—New York Central R.R., supra*, 327 I.C.C. at 511. Impairment of routing powers by car service rules of this nature also may infringe the shippers' common law right to redirect shipments in transit. *See Gulf, C. & S.F. R.R.* v. *Texas Packing Co.*, 244 U.S. 31 (1917).

which obtained the cars to serve other shippers." J.S. App. 66.

Surely this is not the adequate "consideration" contemplated by statute and decisional law. At best it recites an assumption of the Commission without analysis, without findings, and without even record evidence.[46] We submit, therefore, that the Commission's order must be invalidated, for, as this Court has held, if the findings of the Commission "do not provide [the] Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside. . . ." *Schaeffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957).

The substantive unreasonableness of the Commission's unworkable order stands in stark contrast to the other sensible and feasible alternatives available to the Commission. As the Government acknowledges (Govt. Br. 7-8), the Commission is acting on a number of related fronts with regard to car shortages. By the issuance of emergency car service orders under Section 1(15) of the Act, the Commission is dealing with specific shortages. An incentive per diem charge has been made applicable under certain circumstances,[47] and nothing prevents the

[46] Indeed, the Hearing Examiner commented on the lack of evidence in the record as follows:

> "These [car service] rules necessarily affect relations between and among rail carriers and their shippers, or with carriers using competitive modes of transportation. These relations would embrace one or more of the following subjects: per diem, economics, marketing, traffic, statistics, finance, accounting, export or import trades, and law. The witnesses for the Bureau of Operations claim no expertise or education in such fields of knowledge, and did not ask qualified personnel in the Commission to evaluate their proposals in order to discover whether they would produce sound or lawful results." H. Ex. 23, App. 29.

[47] *Chicago, B. & Q. R.R.* v. *New York, S. & W. R.R.*, 332 I.C.C. 176 (1968), *sustained on review sub nom., Union Pacific R.R.* v. *United States*, 300 F. Supp. 318 (D. Neb.) and *Boston and Maine R.R.* v. *United States*, 297 F. Supp. 615 (D. Mass.), *aff'd per curiam*, 396 U.S. 27 (1969).

Commission from further revising the per diem rates so as to make car ownership economically attractive. In addition, there are numerous pending legislative proposals for solving the car shortage problem that is said to exist. Thus, we submit, there is no need for the Commission to misuse distribution rules to attempt to force an increase in size of the car fleet, especially where the effort will not succeed and workable alternatives exist.

II.

THE COMMISSION'S ORDER DOES NOT MEET THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT.

The administrative proceeding that led to the order under review was a formal rule making proceeding. Thus, the Commission, as the proponent of mandatory observance of Car Service Rules 1 and 2, bore the burden of proof, and it was obligated to base its action on "substantial evidence" supported by "the whole record." 5 U.S.C. § 556 (1970). It was required, moreover, to make and set forth "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557 (1970). Further, its conclusions must be rationally related to the bases upon which they purport to rest. *See, e.g., Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gray* v. *Powell*, 314 U.S. 402 (1941). Finally, because agency action cannot be sustained if it is "arbitrary [or] capricious," or is "unsupported by substantial evidence . . . reviewed on the . . . whole record," 5 U.S.C. § 706 (1970), this Court should consider *all* the evidence and determine whether it meets the test of substantiality—*i.e.*, "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d

Cir.) (Learned Hand, J.), *cert. denied*, 304 U.S. 576 (1938).

The district court correctly found that the Commission's order, when so measured, was deficient in several significant respects. As we have shown *supra*, at 28-29, the Commission gave no consideration to the anti-competitive effects resulting from mandatory observance of the rules, or to the devastating financial effect that rigid enforcement of the rules will have on car-poor carriers. In addition, the Commission failed to elucidate how its order will alleviate car shortage problems. It did not afford any meaningful consideration to the injurious effects of the rules upon the shipping public. And, there is no discussion whatever with respect to the adequacy of the exceptions provision. In sum, the Commission's report is devoid of the essential findings and conclusions that the Administrative Procedure Act requires.

A. The Commission Failed To Make Findings Essential To Support Its Conclusion that Mandatory Observance of Car Service Rules 1 and 2 Will Alleviate Car Shortage Problems.

In its report, the Commission's sole conclusion is that

> "there is a continuing freight car shortage which requires affirmative, remedial action at this time. We believe that this situation results from a combination of an inadequate ownership of general purpose type freight cars . . . [by the nation's carriers] and improper utilization of the available freight car fleet." J.S. App. 87.

Clearly, then, "remedial action" must involve improving efficiency of utilization or increasing freight car ownership, or both. But the Commission's report does not include any finding that mandatory observance of Car Service Rules 1 and 2 will accomplish either objective.[48]

[48] Contrary to the Government's implied criticism (Govt. Br. 28, n. 23) of the district court's statement of surprise that "a seven-

The absence of such essential findings is, as the district court correctly held, fatal to the Commission's order. (J.S. App. 25.)

1. The Commission Did Not Find that Mandatory Observance of Car Service Rules 1 and 2 Will Increase Efficient Utilization of Freight Cars.

It is perfectly clear that absolute compliance with Car Service Rules 1 and 2 will not increase the efficient utilization of the freight car fleet. To the contrary, the Commission expressly conceded that mandatory observance of the rules is "not designed to improve the utilization of freight cars . . . ." (J.S. App. 65.) That concession is subject to the qualification: "except insofar as return loading is compatible with the primary objective of increasing availability of the cars to the owner." *Ibid.* Thus, to determine whether the order will improve utilization, one must evaluate the desirability of "increasing availability . . . to the owner." Accordingly, the district court quite properly looked for some Commission finding that car shortages are greater on the high-ownership lines (to which the cars would be returned) than on the car-poor lines (from which the cars are to be diverted). If car shortages are not more acute on the owner lines, then cars will be sent to roads that are not in greater need of them, with the result that car shortage problems will be aggravated rather than alleviated. It was in this context that the district court observed: "Although [the Commission] found a freight car short-

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year study . . . was climaxed by a spartan, one-sentence finding . . ." (J.S. App. 18), the district court did not restrict its review of the Commission's report to the section entitled "Findings." Rather, the court specifically stated:

> "Paucity of words in an agency's finding does not, of course, render it defective. It does require a reviewing court, however, to subject the report to careful examination in order to decide whether the decision met the appropirate tests." J.S. App. 18.

age that was 'all pervasive' throughout the United States, ostensibly on both owner and non-owner lines, the Commission did not find that the shortage was more acute on the owner lines." (J.S. App. 19.) Thus, the court below correctly concluded that the Commission's report was lacking a material finding of fact necessary to sustain its order.

2. The Commission Did Not Find that Mandatory Observance of Car Service Rules 1 and 2 Will Increase the Nation's Freight Car Supply.

The Commission's failure to find that mandatory observance of the car service rules will increase efficient utilization of the existing fleet might be excusable if the Commission had found that its order would alleviate car shortage problems by increasing car supply. But it did not make that finding either. As close as it came was to speculate that:

> "If a railroad has assurances that it can secure frequent and repeated loadings of its own cars, and if it is prohibited from indiscriminate use or misloading of someone else's cars, it will tend to correct any ownership deficiencies it may have." J.S. App. 66.

It is thus clear, and the Government concedes (Govt. Br. 28), that the responsibility for purchasing additional cars lies with the car-poor carriers. Indeed, it would be totally unrealistic to assume that the rules will stimulate high-ownership lines to purchase additional cars: not only do they, by definition, have enough cars, but if their cars are returned to them—whether they want them or not—they may well have excess cars on hand to meet the needs of shippers on their lines. But on the question whether car-poor carriers will in fact purchase additional cars, the Commission's report wholly lacks findings sufficient to support its order.

Whether or not, as the Government asserts (Govt. Br. 25), the Commission's order would place railroads "in a better position to judge their ownership needs . . ."[49] or would "provide an incentive for the railroads to purchase new equipment,"[50] there is no finding that car-poor carriers *will in fact* purchase additional cars. Nor could the Commission have made such a finding on the basis of the record in this case. For there is simply no evidence of the financial ability of *any* railroad, not only the car-poor lines, to purchase additional cars. Indeed, the Commission's main witness testified that he considered the economic impact to be irrelevant to the proceedings. (Tr. 2287-88, App. 120-21.)

Nonetheless, available information indicates that carriers could not respond to the Commission's prodding to

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[49] There is no finding or evidence to support a finding that railroads are not now able to evaluate their ownership needs. In any event, in this very proceeding the Commission promulgated a car ownership formula, whose purpose is to enable railroads to measure the adequacy of their freight car ownership. *See supra*, at 9, n.15.

[50] Again there is no finding or record evidence to support a finding that railroads need an incentive to purchase cars. The Government implies that such evidence exists when it argues that "the evidence established that an alarmingly low percentage of freight cars was on their owners' tracks at any given time and that this low percentage was a contributing factor to the freight car shortage." (Govt. Br. 24.) However, the Commission's chief witness, Robinson, testified unequivocally that the incidence of cars off line does not contribue to car shortage:

> "Dislocation of boxcars to the point where the vast majority are off owners' lines is not, of course, a *cause* of national car shortages, but rather a *result* of such conditions." V.S. 3, p. 110, App. 175 (emphasis supplied).

In any event, as the verified statement of Southern Pacific, cited by the Government (Govt. Br. 30), makes clear: "It is not the *incentive* which is in need of Commission stimulus, but the financial *ability* of the carriers." (V.S. 19, p. 37, App. 200 (emphasis in original)).

purchase additional cars. The Bureau of Enforcement admitted on brief that some roads do not have the financial capacity to acquire substantial additional rolling stock. (Bureau of Enforcement Br. 89, App. 338.) And, as the district court observed:

> "[I]n the same year that Division Three reversed the trial examiner, the I.C.C., in its Eighty-Third Annual Report, 1969, at 72, concluded that 'the general financial condition of railroads may be expected to remain poor, capital expenditures to remain minimal, and reduction in employment extended.'" J.S. App. 21.[51]

Although the basic findings which are indispensable to uphold agency action may "vary with the statutory authority invoked and the context of the situation presented," *Alabama G.S. R.R.* v. *United States*, 340 U.S. 216, 228 (1951), where, as here, the Commission seeks to alleviate a car shortage by requiring deficient carriers to purchase cars, common sense demands that the Commission find, on the basis of substantial evidence, that the car-poor carriers will be able to purchase additional freight cars. The court below correctly recognized the indispensability of such a finding. Thus, it stated that

> "a requirement for the owner railroad 'to increase its fleet' will, of necessity, produce substantial effects on the railroad industry and the shipping public. The record, however, is devoid of evidence which reflects the capacity of the railroad industry to absorb new freight car capital expenditures.
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> * * *
>
> "It is elemental to require that a Commission report and order which may necessitate substantially increased capital expenditures in the railroad industry be buttressed with evidence disclosing the financial

[51] *See also supra*, at 26, n.42, for a more current statement by the Commission on this question.

status of the railroads which will be affected." J.S. App. 20-21.[52]

The requirement that an agency make appropriate findings is not imposed "to insist on formalities and to burden the administrative process with ritualistic requirements." *Yonkers* v. *United States*, 320 U.S. 685, 692 (1944). Rather, it rests upon a recognition that

> "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review . . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (emphasis supplied).

Whether or not the Commission could, on the record evidence, make findings sufficient to support its order, it is clear that it has not done so here.[53]

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[52] In an attempt to minimize the importance of a finding regarding the financial impact of the rules on railroads, the Government states that "a railroad encountering serious financial difficulty as a result of the operation of the car service rules may seek an exception from their imposition under Rule 19 . . . ." (Govt. Br. 30-31). However, there is no basis for the Government's erroneous assumption that an exception would be granted, not for a single car or a set of cars, but for a railroad's entire operation. Moreover, if an exception were granted under these circumstances, the Commission's order would make utterly no sense: the Commission's purpose in depriving car-poor carriers of the use of foreign cars was to compel those carriers to buy cars; if, however, such carriers are entitled to an exception, they will not be "compelled" to buy additional cars.

[53] This Court has held:

> "The Commission's action cannot be upheld merely because *findings might have been made and considerations disclosed* which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding." *SEC* v. *Chenery Corp.*, *supra*, 318 U.S. at 94 (emphasis supplied).

[Footnote continued on page 37]

This case is thus similar to *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C. 1947). In that case, the Commission sought to force prompt return of cars to their owners by including an element of penalty in the per diem charges. The Commission concluded that the increased per diem would promote efficiency of use and increase the supply of freight cars. That order was challenged on the grounds, *inter alia*, that the order was unsupported by and unrelated to the findings.

Responding to this challenge, the *Palmer* court carefully searched the report "to find the obviously requisite determinations" (*id.* at 75) which would support the operation of the Commission's order. The court then summarized the results of its search:

> "There is no finding that the public interest in the return of cars to the owning roads outweighs the public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car. There is no finding that an increase in the per diem would cause the return of a single car to its owner. There is no finding that in times of car shortage, the necessities of the non-owning railroads are less than those of the owning railroads . . . . There is no finding as to what freight needs immediate movement." *Id.*

The search for "the obviously requisite determinations" is as futile here as it was in *Palmer*.[54]

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[53] [Continued]

See also Burlington Truck Lines v. *United States*, *supra* 371 U.S. 156. Absent appropriate findings, the question of sufficiency of the evidence need not be reached. *Florida* v. *United States*, 282 U.S. 194, 215 (1931).

[54] The Government asserts that "[t]he *Palmer* holding was expressly overruled by Congress in enacting the 1966 amendment (80 Stat. 168) to 49 U.S.C. § 1(14)(a)." (Govt. Br. 29, n.24.) It is true that the 1966 amendment specifically empowered the Commission to establish incentive per diem charges, a power that the

Nor can the Commission excuse its failure to make necessary findings by relying upon its "expertise" in matters relating to the railroad industry. *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968), teaches that administrative expertise is not a substitute for adequate findings. In that case, this Court, in affirming the lower court's holding that the Commission's order was not supported by substantial evidence and appropriate findings, stated:

> "if we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming 'a monster which rules with no practical limits on its discretion.' *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act." *Id.* at 91-92.

Similarly, in the case at bar, the Commission cannot rely on its expertise to replace substantial evidence and reasoned findings. The absence of those findings requires, as the district court held, that the Commission's order be set aside.

Palmer court held the Commission did not have under the terms of the 1947 statutory language of Section 1(14). However, Congress' action in no way undermines the holding of *Palmer* that the Commission's action is unlawful because the findings in its report are not sufficient to support its order.

B. The Commission Failed To Give Meaningful Consideration to the Crippling Effects Its Order Will Have on the Shipping Public.

Despite the Government's attempt to imply that shippers approved of mandatory observance of Car Service Rules 1 and 2, the district court's summary of the record is unimpeachable. Thus, that court correctly observed that there was support for Bureau's recommendation "from an isolated sector of American industry, limited by product and geography," but that "the shipping public was generally opposed to the mandatory rules." (J.S. App. 21-22.) And so it was. As we have noted *supra* at 6, both the National Association of Shippers Advisory Boards and the National Industrial Traffic League unequivocally opposed prescription of mandatory observance of the rules and testified that such prescription would be injurious to the shipping public.

The uncontroverted evidence submitted by the appellee steel companies is illustrative of the factual basis from which these shippers' opinions were formed. Steelmaking is a "batch" process. Each of the processes to which the raw material is subjected—its chemical composition, heating, rolling, cooling, cutting and shaping—depends upon the requirements of a particular order. Thus, in general, manufacture and processing are carried on only in response to specific customer orders.[55] Typically, a customer orders several items, each involving multiple production processes. Since it is economical and efficient to ship the entire order at once, the production schedule of the mill

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[55] *See* R.V.S. 41, p. 7 (AISI), App. 251; R.V.S. 58, pp. 11, 16 (Bethlehem Steel Corp.), App. 269, 272; R.V.S. 69, p. 4 (Inland Steel Co.), App. 286; R.V.S. 77, p. 4 (National Steel Corp.), App. 306; R.V.S. 82, p. 5 (U.S. Steel Corp.), App. 310; R.V.S. 85, p. 4 (Wheeling Steel Corp.), App. 326.

is coordinated so that all items near completion at approximately the same time.[56]

Once production is completed, loading crews must assemble and prepare for immediate shipment all of the items comprising the order because storage and shipping space are at a premium.[57] In addition, customers generally do not order steel until they are ready to use it.[58] Therefore, there is considerable pressure on the producers to ship promptly. In fact, customers frequently place orders only with the mill that can assure delivery to suit their time limits.[59]

Because of the many contingencies in processing and quality control, it is impossible to forecast with accuracy the time that any particular shipment will be ready for loading.[60] It is thus impossible to order for loading cars of an ownership appropriate for any such shipment. Steel companies have responded to these uncertainties and pressures by maintaining maximum flexibility in the use of

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[56] *See* R.V.S. 44, pp. 10-11 (Armco Steel Corp.), App. 258; R.V.S. 58, p. 11 (Bethlehem Steel Corp.), App. 269; R.V.S. 82, p. 7 (U.S. Steel Corp.), App. 311.

[57] *See, e.g.*, R.V.S. 82, pp. 19-20 (U.S. Steel Corp.), App. 312-13; R.V.S. 86, pp. 6-7 (Youngstown Sheet & Tube Co.), App. 330.

[58] *See, e.g.*, R.V.S. 82, pp. 13, 17 (U.S. Steel Corp.), App. 311, 312.

[59] *See, e.g.*, R.V.S. 85, p. 5 (Wheeling Steel Corp.), App. 327; R.V.S. 86, p. 7 (Youngstown Sheet & Tube Co.), App. 330.

[60] Studies conducted by U.S. Steel in 1966 showed that during one week, where forecasts were made only 9 to 33 hours prior to a loading turn, 46% of the carloads scheduled were not loaded on the turn scheduled and 44% were not loaded on the day scheduled. R.V.S. 82, p. 22, Exhibit II, App. 314-16. *See also* R.V.S. 40, p. 5 (Allegheny-Ludlum Steel Corp.), App. 248; R.V.S. 41, p. 8 (AISI), App. 252; R.V.S. 69, p. 5 (Inland Steel Co.), App. 286-87; R.V.S. 70, p. 5 (J. & L. Steel Corp.), App. 292-93; R.V.S. 77, p. 4 (National Steel Corp.), App. 306; R.V.S. 82, pp. 5-7 (U.S. Steel Corp.), App. 310-11.

cars delivered to their plants.[61] Such flexibility would be eliminated if railroad practices, upon which steel companies relied in locating their mills and designing their production and shipping facilities,[62] were changed so that carriers were required to adhere absolutely to Car Service Rules 1 and 2. Briefly stated, the evidence submitted by these appellees, taken as a whole, established that, as a practical matter, the effect of the Commission's order would be to limit severely the ability of many steel plants to continue to produce and ship steel; in fact, in some instances, plants might well be forced to close.

The Commission's Bureau did not dispute this evidence. In fact, in its brief to the Commission, the Bureau acknowledged that mandatory observance of the rules would require additional switching; that many steel mills lack sufficient trackage to permit such additional switching and many cannot be expanded to provide such facilities; and that "[a]t many plants the routing requirements would to some extent affect efficiency of utilization of the car fleet." (Bureau of Enforcement Br. 89-90, App. 338-39.) Indeed, the Bureau recognized that several of the problems presented by the steel plaintiffs were "persuasive" and "particularly acute." (Bureau of Enforcement Br. 88, App. 338.)

The Hearing Examiner concluded that mandatory observance of the rules would have a disastrous effect on the steel industry. His findings, including those specifically acknowledging the impossibility of accurate forecasting and the inadequacy of switching facilities, have been set forth *supra*, at 8. These detailed findings should be contrasted with the finding of the Commission:

> "While observance of the rules may require some extra switching and short delays, this small incon-

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[61] *See, e.g.*, R.V.S. 44, pp. 10-11 (Armco Steel Corp.), App. 258; R.V.S. 58, p. 11 (Bethlehem Steel Corp.), App. 269.

[62] *See supra*, at 6-7.

venience and perhaps additional expense is a small price to pay for the overall benefits to be derived when originating lines obtain quick return of their system cars which were acquired to satisfy the needs of local shippers." J.S. App. 67.

If the Commission's statement is intended as a summary of the evidence of injury, it is, at the very least, uncandid.[63] The record is replete with substantial evidence that the shipping public will suffer significant and serious injury as a consequence of the Commission's order. Of course, that evidence might be overcome by substantial evidence that "the overall benefit to be derived" from the order will outweigh the injury. But there is no such evidence. Or, the convincing evidence of injury to the shipping public might be outweighed by evidence that the order will cause carriers to add freight cars to the fleet. But there is no evidence that the carriers will, or even that they can. There is, thus, no basis in the evidence to sustain the Commission's order.

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[63] As the district court correctly observed: "It is impossible to reconcile the divergent appraisal of [the] same data by the Commission and the Examiner." (J.S. App. 23, n.7) The Government argues that the district court "placed undue emphasis on the Hearing Examiner's recommended report" and that, in any event, "the Commission's report answers and refutes each of the Examiner's critical conclusions." (Govt. Br. 31.) But the only answer it can find in the Commission's report to the Examiner's finding with respect to the effects of mandatory observance of the rules is the statement regarding "extra switching and short delays" quoted in the text. Clearly this one sentence does not indicate that the "Commission exhaustively analyzed the evidence" (Govt. Br. 31); moreover, it does not meet even the minimal standard accepted by the Government—that the "findings of the Commission . . . 'reflect attentive consideration to the Examiner's decision.'" (Govt. Br. 33.)

C. The Commission Failed To Make Findings To Support the Adequacy of Its Exceptions Provision.

It is undisputed that perfect compliance with Car Service Rules 1 and 2 is not possible. Accordingly, because failure to comply may subject shippers and carriers to civil and criminal liability, it is essential that adequate provision for exceptions be made. Yet in the present case, the Commission has adopted a provision for granting exceptions which is not only manifestly inadequate and without procedural safeguards, but is completely without foundation in the record. Clearly, findings that the provision for exceptions is sufficient are required in this case, particularly since the Government here admits that, in order to sustain the reasonableness of the Commission's mandatory rules, there must be adequate exception provisions. (Govt. Br. 18, 36.)

1. Unless the Exceptions Provision Is Adequate, the Commission's Order Is Not Reasonable, Because It Is Impossible To Comply with.

In addition to the factors discussed in Part I of this brief, impossibility of compliance with a car service rule may make it unreasonable. In *Iversen* v. *United States*, 63 F. Supp. 1001 (D.D.C.), *aff'd per curiam*, 327 U.S. 767 (1946), the Commission issued a series of emergency orders under Section 1(15) of the Act drastically changing demurrage rules on refrigerator cars during the winter of 1945-46. The effect of the changes was to require the plaintiff to unload cars over the Christmas holiday weekend or pay a penalty demurrage. The plaintiff sought review of the order, urging that, since it had not been possible to unload the cars in question, the order must be held invalid. The court agreed, and finding that the plaintiff could not in fact have complied with the terms of the emergency order, set aside that part of the order with which compliance was impossible.

In the present case, the inability of shippers, including appellee steel companies, to comply with the order is ex-

tensively documented in the record.[64] This evidence was neither disputed nor discredited by Commission witnesses. Indeed at the hearing, the proponent of the Commission's order agreed that perfect compliance with the rules was impossible. (Tr. 1904, 3196, App. 116, 126.) The Hearing Examiner specifically focused on the problem, remarking that "all of the bureau witnesses agreed that perfect compliance with car service rules is impossible." (H. Ex. 24, App. 30.) And, as noted above, he made specific findings as to the impossibility of compliance by the steel industry.[65]

Thus, here, as in *Iversen*, shippers and carriers are unable to meet the requirements of the Commission's order and cannot avoid the penalty provision. In *Iversen*, the penalty was the payment of an excessive demurrage charge. In the present case, the penalty is the threat of prosecution and the imposition of criminal liability under the Elkins Act.[66] Because the rule cannot be complied

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[64] For example, during sample periods, Inland Steel Company found that only 33% of its shipments were loaded in compliance with the rules and that ideal conditions would have enabled only 36% more to be so loaded. (R.V.S. 69, p. 7, App. 288.) Bethlehem Steel's plant at Bethlehem, Pennsylvania loaded 48% in compliance with the rules, with a potential increase to 78% under ideal conditions. (R.V.S. 58, p. 14, App. 271.) Bethlehem Steel's Burns Harbor plant showed 41% presently and 65% possible. (R.V.S. 58, p. 18, App. 274.) And U.S. Steel showed a theoretical compliance of 38-75% at various of its mills. (R.V.S. 83, pp. 7-8, Exhibit 1, App. 319-21.)

[65] *See supra*, at 8.

[66] 49 U.S.C. § 41(1) (1970). An additional problem arises because there is no way for a shipper or carrier to know in advance whether tendering or accepting for shipment a car not loaded in compliance with the rules will subject him to possible criminal liability. During the hearing, the Bureau of Enforcement stated that it would tolerate 80 percent compliance on the part of carriers if there is "a general good-faith attempt to comply with the rule." (Tr. 1572, App. 107.) The Hearing Examiner, reciting the opinion of a Commission witness that "the proposed car service rules should be administered with 'strictly controlled flexibility,'" stated "the

with, it should not be held to be a "reasonable" rule within the meaning of Section 1(14)(a), unless the exceptions provided by the Commission are adequate.

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latter concept may beguile the imagination but it does not provide a comprehensive standard of enforcement." (H. Ex. 24, App. 30.) The district court agreed with this characterization. (J.S. App. 24-25.)

The absence of an ascertainable standard of conduct is highlighted by the Government's brief to this Court, where it states: "In most instances, it is anticipated that the railroads will *either* make a good faith effort to comply with the rules *or* apply for an exception where compliance appears to be impossible or unduly burdensome." (Govt. Br. 35, emphasis supplied.) It is thus not clear whether a shipper or carrier must apply for an exception or whether a "good faith effort" will suffice in lieu thereof. The Government seeks to avoid the difficulties inherent in this uncertainty by arguing that "criminal penalties would still be dependent upon a showing of criminal intent . . . ." (Govt. Br. 35.) However, the Elkins Act does not require specific intent as an element of the crime, but applies the less stringent statutory intent standard—the party charged is guilty if he purposely does an act prohibited by statute, even though the act does not involve turpitude or moral wrong and the party does not intend to violate the law. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 85 (1908). *See also, Union Pacific R.R.* v. *United States*, 313 U.S. 450, *rehearing denied*, 314 U.S. 707 (1941).

Under these circumstances, the Commission has not provided meaningful standards of conduct consistent with the recognition of all parties that compliance with Car Service Rules 1 and 2 is not possible. Such a failure to provide clear standards for the application of criminal statutes is a defect of constitutional proportions. *See, e.g., United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921). This Court, like the district court, need not reach this constitutional issue if it affirms the district court's holding that the Commission's order is unreasonable either under Section 1(14)(a) or the Administrative Procedure Act.

2. The Commission Did Not Make the Necessary Finding that the Exceptions Provision in Its Order Is Adequate.

The exceptions provision can best be described as an afterthought. In its initial report prescribing Car Service Rules 1 and 2 for mandatory observance, the Commission did not provide for exceptions. It was only after appellees filed petitions for reconsideration that the Commission added Rule 19, which provides for exceptions.[67] However, no hearings were held between the issuance of the initial report and the adoption of Rule 19, nor did the order adding Rule 19 to the Commission's previous order recite any findings, let alone evidence upon which findings could be based, establishing the adequacy of the exceptions mechanism.

The failure of the Commission to obtain evidence and make reasoned findings with respect to the adequacy of its exceptions provision is significant for two reasons. First, as discussed above, if the exceptions provision is not adequate, mandatory observance of Car Service Rules 1 and 2 is not a "reasonable" order. Second, there is substantial evidence in the record which indicates that the Commission's exceptions provision is inadequate.

The need for deviation from the rules follows no predictable pattern, but arises on a day-to-day and hour-to-hour basis. Appendix B to the Bureau's brief filed with the Commission shows that average daily loadings of plain boxcars were 39,782 in 1964, or over 10 million during the entire year. If, as Commission witnesses ac-

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[67] Rule 19 provides as follows:

"Rule 19—Exceptions. Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or aleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C." J.S. App. 172.

knowledge, carriers and shippers can achieve only 80% compliance with the mandatory rules (Tr. 1570, App. 106), the Commission's order would produce over 2 million requests for exceptions each year, or nearly 40,000 requests each week. The size of an administrative apparatus adequate to handle this deluge would be staggering. And even if the Bureau of Operations were adequately staffed to receive and process all these requests, it is questionable whether the requests could be granted as promptly as would be necessary to satisfy the needs of the shipping public.[68]

In its brief before this Court, the Government does not assert that there is evidence of record to support any finding as to the adequacy of the Commission's exception provision. (Govt. Br. 34-35.) Rather it relies solely on a statement taken out of context from the AAR's Petition for Reconsideration.[69] Significantly, the Government failed to include the AAR's statement in the same document that:

> "This is not to suggest that the railroads invite the imposition of mandatory car service rules or the suggested exception arrangement as an improvement

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[68] Indeed, the Hearing Examner criticized a Bureau proposal for exceptions similar in effect to Rule 19 as "inflexible" and "dilatory" and concluded that the suggested exception provision "could frustrate effective action by railroad operating officials." H. Ex. 40-41, App. 47-48.

[69] The statement quoted by the Government is as follows:

> "There is only one feasible way to operate the railroads under a mandatory system of car service rules. The Chairman of the AAR Car Service Division must be allowed to grant exceptions to the rules whenever literal compliance would be detrimental to or frustrate the objectives of the rules, with the possible proviso that, should the Commission desire to retain overall supervision of such procedure, all exceptions granted shall be filed with the Commission by the Chairman and be subject to suspension or cancellation. Specifically, the railroad respondents request that . . . the following provision must also be prescribed as an integral part of the same set of regulations . . . ." AAR Petition for Reconsideration, p. 89, App. 340.

over present conditions. Quite to the contrary—it is our view that even the foregoing exception proposal would be cumbersome, burdensome, and expensive, and of unproven benefit to the railroad industry and to the shippers as a whole. However, such a procedure, cumbersome or burdensome though it may be, is far preferable to the alternative—mandatory rules which are impossible to fully comply with and no provision for exceptions." AAR Petition for Reconsideration, p. 92, App. 342.

Thus the only support offered by the Government to sustain the adequacy of the exceptions provision proves quite the contrary when placed in its proper context.

Finally, the granting of exceptions is left to the unfettered caprice of a Commission employee. There are no stated procedural standards to govern the exercise of this vast power. There is no requirement of a hearing or of making findings—or even that the grant or denial of exceptions be made public. Thus, the Commission's life-and-death power to relieve a shipper or carrier from rules with which compliance is admittedly impossible is not hedged with a single safeguard. Plainly, such a provision is unreasonable.

CONCLUSION

Appellees have shown that the Commission's order is not "reasonable" within the meaning of Section 1(14)(a) of the Act and that the Commission's report fails to satisfy the requirements of the Administrative Procedure Act for valid agency action. Accordingly, the decision of the court below should be affirmed.

It is important to recognize that affirmance of the district court will not in any way hamper the Commission in its efforts to remedy any car shortage problem it finds in this or in other agency proceedings. The record in this proceeding is still open (J.S. App. 88), and the Commis-

sion may at any time reconsider the evidence now before it and make such findings to support its order as that evidence will permit; or it may receive additional evidence where necessary. Affirmance would neither prevent the Commission from further revising the per diem rates so as to make car ownership attractive, nor interfere with its continuing program of dealing with car shortages by means of emergency orders under Section 1(15) of the Act.

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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February 14, 1972

APPENDIX

APPENDIX

1. Section 1(21) of the Interstate Commerce Act, 41 Stat. 478, as amended, 49 U.S.C. § 1(21) (1970) provides:

> "The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

2. National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of

reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

3. Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556 (1970), provides in pertinent part:

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

4. Section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (1970) provides in pertinent part:

> "(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
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> (1) proposed findings and conclusions; or
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> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
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> (3) supporting reasons for the exceptions or proposed findings or conclusions.
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> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
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> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
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> (B) the appropriate rule, order, sanction, relief, or denial thereof."

5. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1970) provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) Without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."